88- 1838

No.

Supreme Court U.S.
FILED
MAY 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER, 1988 TERM

POLLY METHOD KELLERMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in awarding double costs and attorney's fees in favor of the United States of America when Federal Rule of Appellate Procedure 39 expressly prohibits the United States of America from being awarded costs.

2. Did the Court of Appeals err in finding that petitioner's appeal was frivolous.

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No.

In the Supreme Court of the United States

OCTOBER, 1988 TERM

POLLY METHOD KELLERMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioner herein prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, said judgment being entered on February 10, 1989.

OPINIONS BELOW

The judgment of the Court of Appeals is presently unreported, however the United States Court of Appeals for the Eighth Circuit in its judgment filed February 10, 1989, indicates that said opinion is to be published. (App. A1)

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 10, 1989. (App. A1) The United States District Court for the Western District of Missouri entered its order on February 22, 1989, pursuant to the order of the Eighth Circuit. (App. A6) The order of the United States District Court found in favor of the United States of America, ordering attorney William H. Pickett to pay double costs and attorney's fees. The jurisdiction of the United States District Court was based on 28 U.S.C. § 2675(a), the jurisdiction of the United States Court of Appeals was based on 28 U.S.C. § 1291 and the jurisdiction of this Court rests on 28 U.S.C. § 1254.

RULES INVOLVED

The case involves Federal Rule of Appellate Procedure 39 which states the following:

Rule 39. Costs

(a) To Whom Allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

(b) Costs For and Against the United States. In cases involving the United States or an agency

or officer thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the United States.

(c) Costs of Briefs, Appendices, and Copies of Records. By local rule the court of appeals shall fix the maximum rate at which the cost of printing or otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30(f) shall be taxable. Such rate shall not be higher than that generally charged for such work in the area where the clerk's office is located and shall encourage the use of economical methods of printing and copying.

(d) Bill of Costs; Objections; Costs to be Inserted in Mandate or Added Later. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which the party shall file with the clerk, with proof of service, within 14 days after the entry of judgment. Objections to the bill of costs must be filed within 10 days of service on the party against whom costs are to be taxed unless the time is extended by the court. The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of costs and if the mandate has been issued before final determination of costs, the statement, or any amendment thereof, shall be added to the mandate upon request by the clerk of the court of appeals to the clerk of the district court.

(e) Costs on Appeal Taxable in the District Courts. Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

STATEMENT OF THE CASE

Preliminary Statement

This was an action brought by Petitioner pursuant to the Federal Tort Claims Act, 28 U.S.C. Section 2671 *et seq.* in connection with the psychiatric care and treatment the Petitioner received from a psychiatrist (Dr. Jeffrey Thiele) employed at the Harry S. Truman Memorial V.A. Hospital in Columbia, Missouri.

Suit was filed against the United States of America in the United States District Court for the Western District of Missouri, Western Division based on Dr. Thiele's employment with the V.A. Hospital.

In an opinion filed on March 11, 1988 (App. A7), the District Court found that Dr. Thiele had not acted within the scope and course of his employment and that plaintiff's theories of agency based on the RESTATEMENT OF AGENCY 2D were unpersuasive and would not be considered by the Court.

Petitioner timely filed her notice of appeal to the United States Court of Appeals for the Eighth Circuit on April 8, 1988. On December 28, 1988 (App. A5), the

United States Court of Appeals for the Eighth Circuit filed its opinion finding in favor of the United States of America and further finding that said appeal was frivolous based on the District Court's opinion. On January 11, 1989, Petitioner filed a petition for rehearing which was subsequently denied by the Eighth Circuit on January 27, 1989. (App. A4)

Respondent United States of America in January, 1989, motioned the Court of Appeals to impose double costs and attorney fees based on the fact that the Court of Appeals had found the appeal to be frivolous. Petitioner filed her suggestions in opposition to said motion, and in a judgment filed February 10, 1989, the Court of Appeals granted Respondent's motion for double costs and attorney's fees, and the Court of Appeals further ordered that said costs should be paid directly by Petitioner's counsel, William H. Pickett.

On February 22, 1989, the United States District Court for the Western District of Missouri issued an order pursuant to the directive of the Eighth Circuit Court of Appeals that William H. Pickett pay into the registry of the Clerk of the Court of the United States District Court for the Western District of Missouri for and on behalf of Respondent the sum of TWO THOUSAND FOUR HUNDRED TWENTY ONE AND 10/100 DOLLARS ($2,421.10).

Factual Background

From December 27, 1982, while a resident psychiatrist at the Psychiatric Clinic at Kansas University Medical Center (hereinafter, "K.U.M.C."), Dr. Thiele began treating Petitioner and continued to treat her as an outpatient, and never as an inpatient, until Dr. Thiele left K.U.M.C. employment on September 1, 1983.

When Petitioner first telephoned the K.U.M.C. outpatient clinic in the late December, 1982, time period, Dr. Thiele answered the phone and agreed to undertake the psychiatric care and treatment of Petitioner. He initially treated her as an outpatient.

Petitioner continued seeing him for a month or two for which she was charged. Dr. Thiele would usually put down fifteen (15) minutes when in fact he would see her for two or three hours. Dr. Thiele then advised her to start seeing him as an outpatient in the G Building at K.U.M.C. where she wouldn't have to pay anything. She did what she was told. That is where he gave her books on sex.

Dr. Thiele told Petitioner in order to get rid of her psychiatric problems sex therapy, with his being her tutor about anatomy and sex, was the only method by which she was going to get well. She did what she was told because he was her doctor.

During the eight (8) months preceding the move to Columbia, Missouri in September, 1983, Dr. Thiele gave himself credit for allowing the Petitioner to know more about sex. This occurred during the doctor-patient relationship.

Petitioner moved to Columbia, Missouri, following Dr. Thiele, who worked at the Harry S. Truman Memorial

V.A. Hospital (hereinafter, "the V.A."). Petitioner was a student at the University of Missouri - Columbia (M.U.) when she began treatment by Dr. Thiele at the V.A.; and Dr. Thiele told her she was lucky to be able to be seen at the V.A., since she was a student and worked at M.U. She continued to see Dr. Thiele at the V.A. after she ceased being a student in November of 1983. Dr. Thiele never commented to her in any way that her no longer being a student would make a difference about his ability to see her at the V.A.

No one else employed by the V.A., other than Dr. Thiele, ever told Petitioner that she was eligible for V.A. care, and she never spoke with anyone at the V.A. as to her eligibility for V.A. care. Dr. Thiele deceived Petitioner in a number of respects: he deceived her about the need for sex as part of her therapy; he deceived her about the need to follow him to Columbia, Missouri; he deceived her about drugs and medications and about her entire medical care and treatment. When entering the V.A. to see Dr. Thiele and having him paged, Petitioner requested to see Dr. Thiele at an information booth that she came to after entering the V.A., and as far as she knew, patients for any kind of medical service would go to that information booth to receive information.

Petitioner never served as a member of the armed forces and never applied for or was an employee of the United States government, and the only knowledge she had about eligibility to receive care at the V.A. was what Dr. Thiele told her. Besides what Dr. Thiele told her, the other basis for Petitioner receiving care and treatment at the V.A. was that Dr. Thiele was her doctor and she went where he was at.

Petitioner could see Dr. Thiele around his schedule at the V.A. She typically met Dr. Thiele at the V.A. over lunch break; that is, when he had some spare time. When

Petitioner saw Dr. Thiele at the V.A., she went through only Dr. Thiele to make an appointment to see him.

Dr. Thiele recognized that the transference phenomenon involved the patient falling in love with the doctor and that counter-transference may involve, in part, the doctor allowing his own emotions to interfere with the care and treatment of the patient and to have sex with the patient. Dr. Thiele mishandled these phenomena which constituted medical malpractice.

The evidence adduced was that Dr. Thiele was Petitioner's treating psychiatrist before he was employed at the V.A. and that he had had sexual intercourse with Petitioner prior to the time he was employed there. He was employed as a V.A. physician at the V.A. in Columbia, Missouri. His job duties as a psychiatrist at the V.A. included psychotherapy. Dr. Thiele testified that psychotherapy is primarily talking, for the most part; and he further testified that in his opinion one does not have to be a doctor to be a psychotherapist, but he was a doctor and had been giving psychotherapy for almost a year to the Petitioner. Dr. Thiele admitted that the methodology used in talking with the Petitioner was the same at the V.A. as before the V.A., when he was giving psychotherapy. Dr. Thiele admits that he was hired as a psychiatrist at the V.A. and that providing psychotherapy is part of the responsibility he had. Further, Dr. Thiele admitted that as early as his first day on the job at the V.A. he planned on providing care and treatment to Petitioner as a physician.

Petitioner testified that Dr. Thiele specifically told her to come to the V.A. for psychotherapy. Petitioner did, in fact, have psychotherapy sessions at the V.A., and during October, 1983, these sessions at the V.A. were described as similar to the sessions in Dr. Thiele's office at K.U.M.C. as to content and activity.

In addition, expert testimony adduced on behalf of Petitioner from Dr. Roger Berlin, a psychiatrist, was that the entry into the Petitioner's medical records and the actions of Dr. Thiele were consistent with a doctor's statement relating to continuity of therapy. In addition, Dr. Berlin testified that the doctor-patient relationship between Petitioner and Dr. Thiele continued from December 27, 1982, until March 30, 1984, when the Petitioner left her emotional relationship with the doctor based upon the following facts: the patient came to the doctor at K.U.M.C.; the treatment continued for a number of months; and at the urging of the doctor, the Petitioner followed him to Columbia, Missouri, where no break in treatment in the time sense or in the psychiatric sense or, even in a social sense, occurred. The doctor continued to write prescriptions for the Petitioner/patient, he continued to counsel her, he treated her in his office, and he provided assistance to her. The doctor did not formally terminate the doctor-patient relationship with her by transferring her to someone else's care, or even inform her that such care was available. Therefore, the doctor-patient relationship which began in December of 1982 continued throughout 1983 and into 1984, while Dr. Thiele was an employee of the V.A.

Dr. Thiele agreed that Petitioner suffered from borderline personality syndrome.

When Petitioner was told to go to the V.A. over the noon hours during September, October, November, and December of 1983 and January of 1984 to talk with Dr. Thiele in a fashion similar to that in which she had been talking with Dr. Thiele at both K.U.M.C. and at his home, the Petitioner/patient perceived this as a linear extension of her relationship with the doctor.

To be within the standard of care in psychiatry, the doctor-patient relationship must be ended by a process which goes by the formal name of "termination." It is, in simple terms, a way of letting someone who has been involved in a very intense relationship down easily through a reflecting, a kind of leave taking, a careful saying of goodbye and a review of what has been accomplished in the previous therapy. It is absolutely essential to avoid the experience of abandonment; in addition, it is often quite difficult with borderline patients in particular, because of the emotional hungers of the patient and the patient's dependency needs are strained at that particular point more than at any other time in the therapy.

Dr. Thiele deviated in the standard of care in how he handled the Petitioner/patient's transition to Columbia, Missouri, in that he failed to terminate, and failed to refer the patient and stop treating her himself. He also continued to see the patient in a combined ambiguous medical, sexual and social way. Dr. Thiele himself assured the patient (Petitioner) in writing that he would not abandon her as late as August 28, 1983. The testimony of Petitioner affirmed that she moved to Columbia, Missouri, in August of 1983 so she could be with Dr. Thiele. She wanted to go wherever her doctor went. She was still sick and Dr. Thiele said he would take care of her in Columbia, Missouri, when he moved there. Dr. Thiele at no time, from September 1, 1983, through February, 1984, told the Petitioner she should have a therapist other than himself or suggested a referral. Dr. Thiele did insist she needed therapy, and he was giving her therapy. This was in spite of the fact that Petitioner told her doctor she needed to talk to him or he should refer her to someone else.

REASONS FOR GRANTING THE WRIT

I. The United States Court of Appeals for the Eighth Circuit Erred by Awarding Double Costs and Attorney's Fees in Favor of the United States of America When Federal Rule of Appellate Procedure 39 Expressly Prohibits the United States of America From Being Awarded Costs.

In its judgment filed February 10, 1989, the Court of Appeals granted Respondent's Motion to Impose Double Costs and Attorney's Fees and further ordered that Petitioner's attorney, William H. Pickett pay said costs and fees. The Respondent in this case is the United States of America.

Federal Rule of Appellate Procedure 39 provides in pertinent part the following:

> **(a) To Whom Allowed.** Except as otherwise allowed by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.
>
> **(b) Costs For and Against the United States.** *In cases involving the United States or an agency or officer thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the United States.* (emphasis added)

Subdivision (b) clearly and expressly states that if a case involves the United States, as does this one, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a). In this case, an award of costs was made in favor of the United States and not against Respondent.

Subdivision (b) goes on to clearly and expressly state: ". . . otherwise, costs shall not be awarded for or against the United States." This section of subdivision (b) is the critical aspect of this case. Subdivision (b), in unambiguous language, makes it clear that the United States shall not be awarded costs.

The use of the words "shall not" in subdivision (b) imposes mandatory direction, which leaves no room for discretion in not allowing costs in favor of the United States. In the instant case the Court of Appeals erred by allowing costs in favor of the Respondent when Federal Rule of Appellate Procedure 39 strictly prohibits such an award.

In its judgment filed on February 10, 1989, the Court of Appeals cited the case of *Corpus Christi Taxpayers' Association v. City of Corpus Christi, Texas,* 858 F.2d 973 (5th Cir. 1988) in support of its award of double costs and directing Petitioner's counsel pay said costs. The *Corpus Christi Taxpayers' Association v. City of Corpus Christi* case is not relevant to the present case. Petitioner's arguments are based on Federal Rule of Appellate Procedure 39 which prohibits costs being awarded in favor of the United States. In the *Corpus Christi* case, costs were awarded in favor of the City of Corpus Christi and did not involve in any way an award of costs to the United States of America.

Also cited by the Court of Appeals was the case of *Acevedo v. Immigration and Naturalization Service,* 538 F.2d 918 (2nd Cir. 1976). In *Acevedo* the Court found that the petitioner in that case had had one full-blown deportation hearing and that she had filed a petition for review without producing new evidence and that such petition for review was utterly frivolous and completely lacking in any merit which would permit but one conclusion, that being that review was interposed solely as a delay tactic by counsel who was well aware of its meritlessness.

Acevedo is distinguishable from the instant case. In *Acevedo* the petitioner did not raise as a defense to the imposition of costs Federal Rule of Appellate Procedure 39, which prohibits an award of costs in favor of the United States. In addition, in the instant case the Court of Appeals did not find that Petitioner Polly Kellerman's appeal was filed as a delaying tactic nor could the circumstances surrounding Petitioner's appeal lead to the conclusion that Petitioner was delaying. Petitioner sought appeal in the Eighth Circuit because she believed that the District Court had erred. Also it should be noted that the *Acevedo* decision was made by the United States Court of Appeals for the Second Circuit and not by this Court with whom Petitioner now seeks a writ of certiorari.

The Court of Appeals should not have awarded costs in favor of Respondent United States of America when Federal Rule of Appellate Procedure 39 clearly prohibits such an award.

Furthermore Petitioner respectfully urges this Honorable Court to grant Petitioner's petition based on the fact that this Court needs to resolve the conflict between the Federal Rules of Appellate Procedure and the judgment of the Court of Appeals, which is clearly in direct contrast with the provisions of the rule itself.

II. The United States Court of Appeals for the Eighth Circuit Erred in Finding That Petitioner's Appeal Was Frivolous, When Petitioner's Appeal Clearly Had Merit.

On December 28, 1988, the Court of Appeals found Petitioner's appeal to be frivolous based upon the reasoning of the District Court. In addition, the judgment of February 10, 1989, from the Court of Appeals again ruled that Petitioner's appeal was frivolous. Petitioner's appeal was not frivolous and did have merit.

The District Court found, in its opinion of March 11, 1988, that after September 1, 1983, the doctor-patient relationship between Dr. Thiele and Petitioner ceased to exist and had become a strictly social relationship and in no way was related to medical treatment. It was not frivolous to ask the Court of Appeals to review such a finding in light of the fact that Petitioner produced uncontroverted testimony by Dr. Roger Berlin that the doctor-patient relationship continued at the time Dr. Thiele began his employment by the V.A. after September 1, 1983.

Also in the District Court's opinion the court found that the Eighth Circuit had never faced the issue of determining whether a psychiatrist at the V.A. was within the course and scope of his employment while engaging in a sexual relationship with a patient. However, even though the court admitted the issue had not been dealt with, the court ruled that Dr. Thiele was not in the course and scope of his employment. It is not frivolous to ask the Court of Appeals to review a factual situation and issue about which it has never dealt.

In addition, the Court of Appeals found that Petitioner's arguments that Respondent is liable for Dr.

Thiele's conduct under § 261 and § 262 of the RESTATEMENT OF AGENCY 2D, were unpersuasive and would not be considered.

Sections 261 and 262 of the RESTATEMENT OF AGENCY 2D provide as follows:

> A principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit fraud upon third persons is subject to liability to such third persons for the fraud.
>
> A person who otherwise would be liable to another for the misrepresentations of one apparently acting for him is not relieved from liability by the fact that the servant or other agent acts entirely for his own purposes, unless the other has notice of this.

Due to the fact that Dr. Thiele deceived Petitioner and it was the V.A. as the principal that put Dr. Thiele in a position which enabled him, while apparently acting within his authority to commit a fraud, then the V.A. would be liable even though it was unaware of Dr. Thiele's activities. It was not frivolous to ask the Court of Appeals to review the District Court's refusal to consider an application of the principles of agency which were grounded in fact.

It was also not frivolous to ask the Court of Appeals to review the District Court's refusal to allow Petitioner to amend her complaint to assert claims of negligent supervision and negligent hiring by the V.A. of Dr. Thiele in light of Federal Rule of Civil Procedure 15 which provides that leave to amend a complaint shall be freely given when justice so requires.

An appeal is frivolous for the purposes of awarding costs and fees when the results are obvious or the appellant's arguments are wholly without merit. *Lopez v. Dean Witter Reynolds, Inc.*, 805 F.2d 880 (9th Cir. 1986), *International Union of Bricklayers, Etc. v. Martin Jaska, Inc.*, 752 F.2d 1401 (9th Cir. 1985).

An appeal is frivolous when legal points involved are not arguable on their merits. *Hagerty v. Succession of Clement*, 749 F.2d 217 (5th Cir. 1984).

In the instant case the results were not obvious due to novel issues being raised and the fact that the Eighth Circuit had not dealt with an issue like the one raised in this case. Petitioner's legal points were completely arguable on their merits and therefore, said appeal was not frivolous. Because the record and appellate briefs did not indicate that the appeal was filed as a delay tactic, and the appeal contained legitimate disputes upon whose outcomes reasonable persons could differ, the appeal was not frivolous. *Autorama Corp. v. Stewart*, 802 F.2d 1284 (10th Cir. 1986).

In the instant case, it was not frivolous to ask the Court of Appeals to review: a finding of fact by the District Court which was contrary to uncontroverted evidence; an issue which the Eighth Circuit had never addressed; to review an expansion of the law of agency by RESTATEMENT OF AGENCY 2D; and to review the District Court's refusal to allow Petitioner to amend her complaint. Therefore, the Court of Appeals erred in finding Petitioner's appeal frivolous when said appeal was in fact meritorious.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully submits that this Petition should be granted and a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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PETITIONER'S CERTIFICATE OF SERVICE

Three copies of the above and foregoing were mailed, United States Mail, postage prepaid, to: Hon. Charles Fried, Solicitor General, Main Justice Building, 10th & Constitution, N.W., Washington, D.C. 20530 and Kenneth Josephson, Assistant United States Attorney, United States Courthouse, 811 Grand Avenue, Kansas City, Missouri 64106, attorney for the United States, this 11th day of May, 1989.

WILLIAM H. PICKETT
Attorney for Petitioner

APPENDIX

(Filed February 10, 1989)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1617

Polly Method Kellerman,
Appellant,

v.

United States of America,
Appellee.

ON MOTION TO IMPOSE DOUBLE COSTS AND ATTORNEY FEES

Filed: February 10, 1989

Before LAY, Chief Judge, FAGG, Circuit Judge, and REASONER,* District Judge.

PER CURIAM.

This matter comes before the court on the government's motion for double costs and attorney fees which it bases on the fact that the appeal in this case was dismissed as frivolous. We grant the motion to award double costs and attorney fees under Federal Rule of Appellate Procedure 38 and order that they be paid into

*The HONORABLE STEPHEN M. REASONER, United States District Judge for the Eastern District of Arkansas, sitting by designation.

the registry of the clerk of court of the United States District Court for the Western District of Missouri for and on behalf of the United States of America. We further order that the costs and attorney fees be paid directly by appellant's counsel, William H. Pickett, rather than by his client. *See Corpus Christi Taxpayer's Ass'n v. City of Corpus Christi, Tex.*, 858 F.2d 973, 977 (5th Cir. 1988); *Acevedo v. INS*, 538 F.3d 918, 921 (2d Cir. 1976).

The present case was brought by Polly Kellerman under the Federal Tort Claims Act in connection with the alleged improper activities of Dr. Jeffrey Thiele, a psychiatrist who was then employed by the Harry S. Truman Memorial Veterans' Administration Hospital (V.A. Hospital) in Columbia, Missouri. Kellerman retained Thiele's services prior to his employment with the V.A. Hospital while he was a resident at the Kansas University Medical Center. Kellerman and Thiele became involved in a social relationship which allegedly included sexual encounters. When Thiele relocated in Missouri to work at the V.A. Hospital, Kellerman voluntarily moved to Columbia in order to continue her treatment with Thiele. Her relationship with Thiele continued while he was employed as a psychiatrist for the V.A. Hospital.

The very limited involvement of the V.A. Hospital and the United States with this case is set forth above. The trial court found nothing in the record to indicate that Kellerman ever received medical care at the V.A. Hospital. Kellerman is not a veteran of the armed forces and has never been eligible for Veterans' Administration benefits. She was not treated as a patient at the V.A. Hospital and she was never billed for any services rendered by the V.A. Hospital.

Kellerman's counsel claims that his theory is based upon an expansion of liability under the Restatement (Second) of Agency §§ 261 and 262. There is no factual predicate on which such a claim could be made and there is no serious legal argument that would support such an application of the Restatement. The claim against the Veterans' Administration is completely frivolous and any reasonable evaluation by counsel should have reached the same conclusion. Plaintiff has failed to prove that a cause of action exists against the defendants and on this basis the court unanimously finds that counsel shall be directly liable for double costs and attorney fees as claimed by the United States. We find the costs of $359.80 and attorney fees of $1,701.50 incurred by the government on appeal to be reasonable. The cause is remanded to the district court for entry of judgment in favor of the United States in the sum of double costs and attorney fees.

A true copy.

Attest:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

(January 27, 1989)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1617

Polly Method Kellerman,
Appellant,

vs.

United States of America,
Appellee.

Appeal from the United States District Court for the
Western District of Missouri

Appellant's petition for rehearing has been considered by the Court and is denied.

January 27, 1989

Order Entered at the Direction
of the Court:

/s/ Robert D. St. Vrain
Clerk, U. S. Court of Appeals,
Eighth Circuit.

(Filed December 28, 1988)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1617

Polly Method Kellerman,
Appellant,

v.

United States of America,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: December 15, 1988
Filed: December 28, 1988

Before LAY, Chief Judge, FAGG, Circuit Judge, and REASONER,* District Judge.

PER CURIAM.

The judgment entered in favor of the United States of America against Polly Method Kellerman is hereby affirmed. The appeal is frivolous and the complaint should be dismissed for the reasons set forth in the district court opinion. *See* 8th Cir. R. 14. All costs are assessed against the appellant.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

*The HONORABLE STEPHEN M. REASONER, United States District Judge for the Eastern District of Arkansas, sitting by designation.

(Filed February 22, 1989)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
CENTRAL DIVISION

No. 86-4310-CV-C-5

POLLY METHOD KELLERMAN,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

ORDER

Pursuant to the directive of the Eighth Circuit Court of Appeals filed on February 10, 1989, it is hereby

ORDERED that judgment is entered in favor of defendant/appellee the United States of America. It is further

ORDERED that Attorney William H. Pickett pay into the registry of the Clerk of the Court of the United States District Court for the Western District of Missouri for and on behalf of defendant/appellee United States of America the sum of $2,421.10 (double costs of $719.60 and attorney fees of $1,701.50).

/s/ Scott O. Wright
Scott O. Wright
United States District Judge

February 22, 1989.

(Filed March 11, 1988)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
CENTRAL DIVISION

No. 86-4310-CV-C-5

POLLY METHOD KELLERMAN,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

ORDER AND MEMORANDUM

The plaintiff instituted this action under the Federal Tort Claims Act, 28 U.S.C. § 1346 and 2671 *et seq.*, in connection with the alleged improper sexual activities of her treating psychiatrist, Dr. Jeffrey Thiele, while he was employed at the Harry S. Truman Veteran's Administration Hospital in Columbia, Missouri. Prior to the filing of this lawsuit, plaintiff Kellerman filed an administrative claim with the Veteran's Administration stating that Dr. Thiele had coerced her into performing various improper sexual acts on the V.A. premises. The Veteran's Administration failed to make a final disposition of the claim within six months after it was filed. Therefore, it is deemed a final denial of claim pursuant to 28 U.S.C. § 2675(a) and this Court has jurisdiction over the plaintiff's cause of action. Dr. Thiele and his previous employer, the University of Kansas, have been named as defendants in a related state court action.

In this federal court proceeding, the plaintiff alleges that the United States of America is liable under the Federal Tort Claims Act for the negligent psychiatric treatment of the plaintiff by Dr. Jeffrey Thiele. The plaintiff claims that this liability arises because, during the time that Dr. Jeffrey Thiele was providing psychiatric care and treatment for the plaintiff, he was an employee of the United States Government acting within the scope of his employment at the Harry S. Truman Veteran's Administration Hospital in Columbia, Missouri.

A bench trial was held before the Court on September 21, 22 and 23, 1987. At trial, the parties agreed to limit presentation of evidence solely to the issue of scope of employment. No evidence on the issue of damages was heard, necessitating a remand if the Court of Appeals reverses on this issue. Therefore, scope of employment is the only subject to be dealt with in this order. Based on the following findings of fact and conclusions of law, the Court concludes that the defendant United States of America is not liable to the plaintiff because Dr. Jeffrey Thiele was not acting within the scope of his employment as required by the Federal Tort Claims Act, 28 U.S.C. § 1346(b). Therefore, the plaintiff is not entitled to recover damages against the defendant United States Government in this action.

I. *Findings of Fact*

1. Dr. Jeffrey Thiele is a Board Certified psychiatrist who is currently employed on a full-time basis at the Harry S. Truman Veteran's Administration Hospital (V.A.) in Columbia, Missouri.

2. The plaintiff, Polly Method Kellerman, was a patient of Dr. Jeffrey Thiele at the Kansas University

Medical Center until Dr. Thiele left this position on September 1, 1983.

3. While the relationship between plaintiff Polly Method Kellerman and Dr. Jeffrey Thiele began as a doctor/patient relationship, it evolved into a social relationship which included sexual encounters.

4. After September 1, 1983, when Dr. Jeffrey Thiele left his employment at the Kansas University Medical Center, the doctor/patient relationship was terminated and the plaintiff continued to see Dr. Jeffrey Thiele on a strictly social basis.

5. The plaintiff's decision to move to Columbia when Dr. Jeffrey Thiele accepted his position at the V.A. was based purely upon her social relationship with Dr. Jeffrey Thiele.

6. Because Dr. Thiele is a full-time psychiatrist at the V.A., special permission is required to see patients who are ineligible for V.A. care.

7. Dr. Thiele signed a "Certification of Outside Professional Activity" which acknowledged that he could not participate in outside or non-V.A. professional activity without specific permission of the V.A.

8. The plaintiff, Polly Method Kellerman, was ineligible for V.A. care.

9. Dr. Thiele never sought permission to treat the plaintiff, Polly Method Kellerman, on V.A. premises.

10. Medical records are kept on all V.A. patients who are treated at the V.A.

11. There was no record of any kind at the V.A. which indicates that the plaintiff, Polly Method Kellerman, was being treated by Dr. Thiele.

12. Dr. Thiele did not maintain a medical chart on plaintiff, Polly Method Kellerman, at the V.A.

13. Generally, doctors at the V.A. only treat individuals who are classified as veterans who have been on active duty who were not dishonorably discharged.

14. The V.A. doctors may treat persons other than veterans through formal contractual arrangements, during emergencies, and, in some cases, through other federal agencies.

15. A medical record is established for all non-veteran patients who are treated at the V.A.

16. All non-veteran patients are billed by the V.A.

17. V.A. physicians are not authorized to waive billing.

18. Non-veteran records are contained in the same type of chart jacket as regular patients, but are noted as non-veterans.

19. To be treated as a non-veteran at a V.A. facility on an inpatient or outpatient basis, a non-veteran must make an application which is reviewed for eligibility.

20. The V.A. keeps a record of those individuals who apply for V.A. care but are found ineligible.

21. There is no record that Polly Method or Polly Kellerman ever applied for V.A. medical care.

22. There is no record of any medical care being extended to plaintiff, Polly Method Kellerman.

23. There is no record that Polly Method or Polly Kellerman ever received medical care at the V.A. Mental Health Hygiene Clinic.

24. The general public is free to enter and leave the Harry S. Truman Veteran's Administration Hospital at will.

25. The only time individuals are required to check in at the information desk is between 10:00 p.m. and 6:00 a.m.

26. There are signs posted in the Harry S. Truman Veteran's Administration Hospital which identify the facility as a Veteran's Administration institution.

27. On the outside of the Harry S. Truman Veteran's Administration Hospital, there are ten-foot letters identifying the facility as a veteran's hospital.

28. A full-time V.A. physician is considered to be on duty twenty-four hours a day, seven days a week, and is subject to being called in for additional duties at any time during the course of his employment.

29. A V.A. physician is never authorized to see non-paying patients on V.A. premises.

30. Section 814 of the standards of ethical conduct and related responsibilities states that an employee shall not misuse federal Government property or resources. This section also forbids use of government property for any activities which have not been officially approved.

31. Plaintiff Polly Method Kellerman was neither an outpatient nor an inpatient at the V.A. Hospital.

32. Dr. Thiele never told the plaintiff, Polly Method Kellerman, that she could receive medical care at the Harry S. Truman Veteran's Administration Hospital.

33. After September 1, 1983, the relationship between plaintiff, Polly Method Kellerman, and Dr. Jeffrey Thiele, while highly unethical, was strictly social

(sexual) and was in no way related to medical treatment at the Harry S. Truman Veteran's Administration Hospital in Columbia, Missouri.

II. *Conclusions of Law*

The Federal Tort Claims Act, 28 U.S.C. §§ 1346 and 2671 *et seq.*, was passed by Congress to provide a means for individuals to sue the United States in actions for money damages because of negligent or wrongful acts committed by federal employees while acting within the scope of their employment. In the instant case, the Court denied the defendant's motion for summary judgment because the plaintiff had presented a genuine issue of material fact as to whether Dr. Jeffrey Thiele was acting within the scope of his employment. The Court has now heard all the evidence on this issue and concludes that Dr. Jeffrey Thiele's activities fell outside the scope of his employment as a psychiatrist at the Harry S. Truman Veteran's Administration Hospital.

It is well-settled that the United States, as sovereign, is immune from lawsuits except where it consents to be sued. *U.S. v. Sherwood*, 312 U.S. 584, 61 S.Ct. 767, 769 (1941). Further, in construing waivers of sovereign immunity, courts are not free to extend or narrow the waiver beyond what Congress intended. *U.S. v. Kubrick*, 444 U.S. 111, 117-19, 100 S.Ct. 352, 356-58 (1979). Therefore, it is necessary for this Court to determine how the narrow definition of scope of employment applies to Dr. Jeffrey Thiele and the Veteran's Administration Hospital in the present case.

For purposes of the Federal Tort Claims Act, state law controls the issue of scope of employment. *See Stencel Aero Engineering v. United States,* 431 U.S. 666,

97 S.Ct. 2054 (1977); *Wollman v. Gross*, 637 F.2d 544, 547 (8th Cir. 1980). The case of *Bates v. United States*, 517 F. Supp. 1350 (W.D. Mo. 1981), *aff'd*, 701 F.2d 737, 739 (8th Cir. 1983), provides a detailed analysis of the Missouri law on agency or the relationship between master and servant with respect to scope of employment. The *Bates* court begins its analysis of respondeat superior law in Missouri with the seminal case of *Haehl v. Wabash R. Co.*, 119 Mo. 325, 24 S.W. 737 (1893).

In the *Haehl* case, the plaintiff brought a cause of action for the wrongful death of her husband against the defendant Wabash Railroad because a Wabash Railroad employee shot him for trespassing on a railroad bridge. The Missouri Supreme Court held that:

> The principal is responsible, not because the servant has acted in his name or under color of his employment, but because the servant was actually engaged in or about his business, and carrying out his purposes. . . . But if his business is done, or is taking care of itself, and his servant, not being engaged in it, not concerned about, but impelled by motives that are wholly personal to himself, and simply to gratify his own feeling . . . when that has and can have no tendency to promote any purpose in which the principal is interested, and to promote which the servant was employed, then the wrong is purely the personal wrong of the servant, for which he, and he alone, is responsible.

Id. at 339, 740.

In the *Bates* opinion, Judge Collinson of the Western District of Missouri held that the test to be used "in determining whether a servant's tortious conduct is within the scope of employment is not whether the ser-

vant's act was committed during the term of his employment, but whether it was committed with the intent to further the purposes of the master." *Bates*, 517 F. Supp. at 1355.

The Eighth Circuit Court affirmed the Western District's opinion in *Bates*. *See Bates v. United States*, 701 F.2d 737, 738 (8th Cir. 1983). However, the Eighth Circuit was convinced that the Missouri Supreme Court in *Wellman v. Pacer Oil Co.*, 504 S.W.2d 55 (Mo. 1973) (en banc), modified the *Haehl* decision. Under *Wellman*, in order for a principal to be liable for his agent's acts, the acts must not only be taken in furtherance of the principal's business and not impelled by personal motives, but they also must not be 'so outrageous and criminal—so excessively violent as to be totally without reason or responsibility.'" *Bates*, 701 F.2d at 741 *quoting Wellman*, 504 S.W.2d at 58. Thus, it is the *Haehl*, *Wellman*, and *Bates* decisions which must guide the Court in determining whether or not Dr. Jeffrey Thiele was acting within the scope of his employment as a psychiatrist at the V.A. when he was engaged in a sexual relationship with the plaintiff.

The Eighth Circuit has never faced this issue. However, other courts have dealt with analagous situations and their opinions shall be briefly outlined here. In the case of *Focke v. United States*, 597 F. Supp. 1325 (D. Kan. 1982), the plaintiffs attempted to hold the government liable under the Federal Tort Claims Act for a Veterans Administration hospital social worker's involvement in sexual activity with the wife and adopted daughter of a mentally ill patient and the patient's subsequent suicide. The Kansas District Court found that the social worker was not acting within the scope of

his employment as a V.A. social worker because all of his activities were motivated by his own personal wants and desires, and, therefore, the United States could not be held liable for his actions. *Id.* at 1343. Similarly, in the case of *Turner v. United States*, 595 F. Supp. 708 (W.D. La. 1984), four women brought suit under the Federal Tort Claims Act because a National Guard recruiter subjected them to complete physical examinations conducted by him in his capacity as a recruiter. The court refused to hold the government liable because the recruiter was acting for purely personal reasons in giving the offending physical examinations. *Id.* at 710. In *Doe v. United States*, 618 F. Supp. 71, 74 (D. S.C. 1985), the court refused to let the minor plaintiff recover under the Federal Tort Claims Act for a military social worker's alleged fondling because this sexual activity was outside the scope of his employment as a social worker. Finally, in *Thigpen v. United States*, 618 F. Supp. 239 (D. S.C. 1985), two minors were sexually molested by a naval hospital employee. The district court refused to allow the plaintiffs to recover under the Federal Tort Claims Act because the hospital employee was acting outside the scope of his employment in molesting the children. *Id.* at 245.

In the present case, this Court is convinced that Dr. Jeffrey Thiele was acting outside the scope of his employment during his sexual involvement with the plaintiff. In accordance with the Missouri test for respondeat superior, there is simply no evidence that Dr. Jeffrey Thiele conducted his sexual relationship with the plaintiff to further the purposes of his employer, the Veteran's Administration Hospital. It is clear that Dr. Thiele was motivated by his own personal wants and desires. Because the Court finds that Dr. Jeffrey Thiele

was acting outside the scope of his employment as a psychiatrist at the Harry S. Truman Veteran's Administration Hospital, the United States government shall not be held liable for his acts under the Federal Tort Claims Act, 28 U.S.C. § 1346(b).

The plaintiff further argues that if the defendant United States is not liable under the scope of employment theory, then it is liable under §§ 261 and 262 of the *Restatement of Agency 2d*, which held the principal liable for the fraud committed on third persons by his employee. It is the opinion of this Court that the *Restatement of Agency 2d* and the case law cited by the plaintiff are completely unpersuasive in the present action. Therefore, this argument shall not be considered here.

In reaching the above result, the Court wishes to state that it is not unsympathetic to the plaintiff's situation. However, to hold the United States government legally responsible under these circumstances would be contrary to Missouri law on scope of employment and would expand the waiver of sovereign immunity beyond that contemplated by Congress.

Accordingly, it is hereby

ORDERED that the Clerk of the Court enter judgment herein in favor of defendant and against the plaintiff.

/s/ Scott O. Wright
Scott O. Wright
United States District Judge

March 11, 1988.